DFWS, Inc. d/b/a The Guild San Jose *and* United Food and Commercial Workers Union, Local 5. Case 32–CA–261075

November 20, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This is a refusal-to-bargain case in which the Respondent, DFWS, Inc. d/b/a The Guild San Jose, is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed on May 29[1] and June 24, 2020, respectively, by United Food and Commercial Workers Union, Local 5 (the Union), the General Counsel issued the complaint on July 2, 2020, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 32–RC–248845. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On August 10, 2020, the General Counsel filed a Motion for Summary Judgment. On August 12, 2020, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response to the Notice to Show Cause and an opposition to the Motion for Summary Judgment. The Union filed an Amended Joinder in Motion for Summary Judgment and Request for Remedies.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the Union's certification of representative based on its objections to the election and the Board's disposition of four challenged ballots in the underlying representation proceeding.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation with an office and place of business located in San Jose, California,

[1] In its amended answer, the Respondent states that it has insufficient knowledge to admit or deny the complaint allegation regarding the dates of the filing and service of the charge. However, copies of the charge and affidavit of service are attached as exhibits to the General Counsel's motion showing the dates as alleged, and the Respondent does not challenge the authenticity of those documents. See, e.g., *Ashland Nursing & Rehabilitation Center*, 357 NLRB No. 90, slip op. at 1 fn. 1 (2011) (not reported in Board volume), enfd. 701 F.3d 983 (4th Cir. 2012); *More Truck Lines*, 338 NLRB 796, 796 fn. 1 (2003).

The Respondent also asserts that it has not received a copy of the charge. However, the affidavit of service shows that the charge was served on Dana Anderson, and the Respondent admits that Anderson is its agent within the meaning of Sec. 2(13) of the Act. See *United Construction Contractors Assn.*, 347 NLRB 1, 2 (2006) (explaining that Sec. 10(b) requires service of the charge upon the person charged or his agent). Further, even assuming the charge was not properly served on the Respondent in a timely manner, any such failure "[would] be cured by timely service within the 10(b) period of a complaint on the respondent, absent a showing that the respondent is prejudiced by [the] circumstances." *Buckeye Plastic Molding*, 299 NLRB 1053, 1053 (1990); see also *Belgrove Post Acute Care Center*, 361 NLRB 964, 964 fn. 1 (2014). Here, there has been no assertion, much less a showing, of prejudice to the Respondent in this proceeding. Indeed, the Respondent admits that the Union filed a charge with the Board and that Region 32 informed it of the allegations by letter dated June 2, 2020.

[2] The Respondent also asserts that the Regional Director prematurely opened and counted the challenged ballots. This contention was raised and rejected in the underlying representation proceeding.

In addition, the Respondent's amended answer denies the allegation in para. 6 of the complaint, which sets forth the appropriate unit. The unit issue, however, was fully litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding.

Further, the Respondent asserts as an affirmative defense that the complaint fails to state a claim upon which relief can be granted. The Respondent has not offered any explanation of this bare assertion, and it admits that it has refused to bargain. Thus, we find that this affirmative defense is insufficient to warrant denial of the General Counsel's Motion for Summary Judgment. See, e.g., *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58, slip op. at 1 fn. 1 (2018), and cases cited therein.

and is engaged in the business of dispensing cannabis products.[3]

During the 12-month period ending March 1, 2020, the Respondent derived gross revenues in excess of $500,000, and during the same period, it purchased and received goods and services valued in excess of $5000 directly from businesses located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on October 18, 2019, the Union was certified on March 31, 2020,[4] as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Front Desk, Inventory, Cultivation, Processing, Budtender, Distribution Manager, and Floor Manager employees; excluding the Operations Manager, Marketing Director, Store Manager, Assistant Store Manager, Confidential employees, Office Clerical employees, Guards and Supervisors as defined in the National Labor Relations Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

Dana Anderson has been an agent of the Respondent within the meaning of Section 2(13) of the Act.[5]

By letter dated April 2, 2020, email dated April 3, 2020, and email dated May 27, 2020, the Union requested and demanded that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit.

By email dated April 6, 2020, and email dated May 28, 2020, the Respondent refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since April 6, 2020, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).[6]

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[3] The Respondent's amended answer states that, absent a definition of "all material times" in the complaint allegation regarding its place and type of business, it is without knowledge to admit or deny that allegation. However, immediately thereafter the Respondent admits that it is a California corporation with an office and place of business in San Jose, California, and that it is engaged in the business of dispensing cannabis products.

[4] By unpublished Order dated May 27, 2020, the Board denied the Respondent's requests for review of the Regional Director's Decision Affirming the Hearing Officer's Findings and Recommendations and Order to Open and Count Determinative Challenged Ballots and the Regional Director's Certification of Representative.

[5] The Respondent states that, absent a definition of "all material times," it is without knowledge to admit or deny the complaint allegation regarding Dana Anderson. Although the Respondent denies the allegation that Anderson has held the position of Operations Manager, it admits that Anderson has been its agent within the meaning of Sec. 2(13) of the Act. See, e.g., *NP Lake Mead LLC d/b/a Fiesta Henderson Casino Hotel*, 368 NLRB No. 19, slip op. at 2 fn. 6 (2019).

In addition, the Respondent denies the complaint allegation that an unnamed attorney has been its agent within the meaning of Sec. 2(13) of the Act. This denial, however, does not preclude summary judgment or raise a material issue warranting a hearing. First, the Respondent admits in its amended answer that it has authorized its counsel of record, Robert K. Carrol, to respond on its behalf to requests by the Union for bargaining and related matters. Additionally, the Respondent admits in its amended answer that its counsel of record notified the Union by email that the Respondent refused to bargain with the Union. See, e.g., *D&H Demolition, LLC*, 368 NLRB No. 113, slip op. at 3 fn. 7 (2019).

[6] In addition to the customary notice-posting remedy, the General Counsel requests that the Board order the Respondent to mail a copy of the notice to each unit employee. We deny this request because the General Counsel has not shown that this additional measure is needed to remedy the effects of the Respondent's unfair labor practices. See *Environmental Contractors, Inc.*, 366 NLRB No. 41, slip op. at 4 fn. 6 (2018); *On Target Security, Inc.*, 362 NLRB No. 31, slip op. at 2 (2015); *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2004).

ORDER

The National Labor Relations Board orders that the Respondent, DFWS, Inc. d/b/a The Guild San Jose, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food and Commercial Workers Union, Local 5 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

> All full-time and regular part-time Front Desk, Inventory, Cultivation, Processing, Budtender, Distribution Manager, and Floor Manager employees; excluding the Operations Manager, Marketing Director, Store Manager, Assistant Store Manager, Confidential employees, Office Clerical employees, Guards and Supervisors as defined in the National Labor Relations Act.

(b) Post at its facility in San Jose, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 6, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 20, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The Union requests additional enhanced remedies. Contrary to the Union's assertion, there has been no showing that the Board's traditional remedies are insufficient to redress the violations found. Accordingly, we deny the Union's request for additional remedies. See, e.g., *MHN Government Services, LLC*, 369 NLRB No. 74, slip op. at 2 fn. 6 (2020).

The Union also requests a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." A broad order is appropriate when a respondent has been shown either to "have a proclivity to violate the Act" or to have "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). We find that a broad order is not warranted in the circumstances here. See, e.g., *NP Sunset LLC d/b/a Sunset Station Hotel Casino*, 367 NLRB No. 62, slip op. at 3 (2019), enfd. 792 Fed. Appx. 557 (9th Cir. 2020).

[7] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of the paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Food and Commercial Workers Union, Local 5 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

All full-time and regular part-time Front Desk, Inventory, Cultivation, Processing, Budtender, Distribution Manager, and Floor Manager employees; excluding the Operations Manager, Marketing Director, Store Manager, Assistant Store Manager, Confidential employees, Office Clerical employees, Guards and Supervisors as defined in the National Labor Relations Act.

DFWS, INC. D/B/A THE GUILD SAN JOSE

The Board's decision can be found at https://www.nlrb.gov/case/32-CA-261075 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.